No. 14,752

IN THE

United States Court of Appeals

For the Ninth Circuit

AZ DIN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

DUARD F. GEIS,
Williams, California,
PIERCE & BROWN,
FRED PIERCE,
BENJAMIN H. BROWN,
1023 H Street, Sacramento 14, California,
Attorneys for Appellant.

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS UPON WHICH IT IS CONTENDED THAT DISTRICT COURT HAD JURISDICTION AND THIS COURT HAS JURISDICTION TO REVIEW JUDGMENT IN QUESTION.

This is an appeal from a judgment against appellant in the United States District Court for the Northern District of California upon a verdict finding appellant guilty of violations of Title 21 USCA 188-188n (Relating to Production and Distribution of the Opium Poppy). (R. p. 5.) The charges are in one indictment containing three counts. (R. p. 3, 4.)

Count 1 charges that appellant without having first obtained a license, on June 3, 1954 wilfully, unlawfully and knowingly produced and attempted to produce the opium poppy. (R. p. 3.)

Count 2 charges that appellant, without a license, and on the same date wilfully, unlawfully and knowingly permitted the production of the opium poppy upon one certain place owned, occupied, used and controlled by him. (R. p. 4.)

Count 3 charges that appellant, without a license, heretofore prior to June 3, 1954 "at a time unknown" did wilfully, unlawfully and knowingly obtain opium seed for the purpose of opium poppy production. (R. p. 4.)

The verdict of the jury was guilty on all three counts. (R. p. 5.) Appellant was sentenced to imprisonment for three years on each count to run concurrently and to a fine on each count of $500.00. (R. pp. 6, 7.)

The United States District Court had jurisdiction under 18 USCA Sec. 3231. This Court has jurisdiction under 28 USCA Sec. 1291.

Upon conclusion of the case of the prosecution appellant moved the Court for a judgment of acquittal and dismissal. (R. pp. 57-63.) The motion was denied. (R. p. 63.)

Thereafter on March 25, 1955, the appellant filed his notice of appeal (R. p. 7) and on May 21, 1955 filed his statement of points to be relied upon upon appeal (R. p. 105).

SPECIFICATION OF ERRORS.

Appellant makes the following specification of errors and states the following points upon which he intends to rely:

1. The motion for dismissal should have been granted as to the first and second counts because, there was no proof that the poppies found growing on appellant's property were opium poppies.

2. The motion for dismissal should have been granted as to the third count because:

(a) There was no proof that the seeds found in the possession of appellant were capable of germination and therefore capable of producing opium poppies.

(b) There was no proof that the appellant intended to use the seeds found for growing opium poppies.

3. Appellant was deprived of a fair trial by the misconduct of the United States attorney.

4. Count Three was barred by the Statute of Limitations. (18 USCA Sec. 3282.)

5. Instruction No. 14 charging the jury that proof that the offense was committed within five years of the filing of the charges was in error.

STATEMENT OF FACTS.

"Poppies" Growing on Appellant's Premises; Kind Not Identified.

On June 3, 1954 Joseph H. House, inspector for the State Narcotic Bureau, met Undersheriff Allen Leverett and Deputy Sheriff Clarence Crawford both of Colusa County at Arbuckle in that county (R. p. 36) and together the three went to the ranch of ap-

pellant situated approximately 3½ miles south of Arbuckle (R. p. 12). What they saw when they went there was described by all three:

House testified:

"You come in on the south side of the house; there is a yard which is fenced and approximately the middle or near the east front of the yard there is a patch of approximately 150 poppy plants, approximately six feet tall. That was the first thing that was observed.

Q. And did you find any other poppy plants on the property?

A. Yes, there was one poppy plant to the west of the building, almost adjacent to the building, and three big poppy plants approximately east of the building." (R. pp. 13, 14.)

Leverett testified:

"Q. What did you observe on this ranch?

A. Well, I observed some poppies growing south of the house when we first drove up in the yard and some poppies in bloom on the east side and west side of the house.

Q. And what did you do after you arrived?

A. I took some pictures of the poppies. . . . (The pictures were then identified and admitted in evidence as plaintiff's exhibits 7, 8, 9, and 10.)" (R. pp. 31, 32.)

Crawford testified:

"Q. And what did you observe when you went around to this ranch, if anything?

. . . . . .

A. Well, the first thing our attention was attracted to was some poppies growing in the yard around the house." (R. p. 36.)

There was no testimony in the record whatever as to what kind of poppies the witnesses saw growing at appellant's ranch.

(The fact that the government's agents consistently refrained from referring to the poppies growing at the ranch as opium poppies is significant in view of their particular care, elsewhere in their testimony to refer to the seeds which they found as *opium* poppy seeds.)

There was no effort made to qualify any of these men as experts able to distinguish a growing opium poppy plant from another variety or the poppy species.

There was no effort made to identify the poppies shown in the photographs (Plaintiff's exhibits 7, 8, 9, and 10) as being opium poppies either by witnesses competent to so distinguish them or otherwise.

For all that appears in this record these poppies may have been one of a thousand of innocuous types of poppies, including iceland poppies, metolius poppies, shirley poppies, or even California poppies.

Opium Poppy Seeds Found in Appellant's House; Pods in Garage.

From the yard the three government agents went into the house.

House testified:

"Q. And what did you find in the dwelling house?

A. I found numerous bottles and packages containing opium seeds.

Q. Mr. House, I show you a cardboard box, from which I have removed a burlap sack, and ask if you have seen the box and sack before?

A. Yes, I have seen the box. I wrote my initials and also the label on the outside, dated 6-4-53, name Az Din, City of West Arbuckle, violation, and the officers on the sack and the contents of the box and the date I gave it to the chemist.

Q. Do you know what is in the sack, the burlap sack?

A. Yes, there are 1301 opium poppy pods dried.

Q. Where were these pods obtained, if you know?

*A. They were obtained from the garage of Az Din.**

Q. And were they placed in this sack?

A. Yes, they were.

Q. Who placed them there?

A. Myself and undersheriff Leverett and deputy sheriff Crawford.

Q. What was done with the sack?

A. It was kept in my custody and taken to the State Narcotic Bureau, City of Sacramento, and turned over to chemist inspector Gilmore on 6-9-54." (R. pp. 14, 15.)

(The witness then was shown another sack containing bottles of seed which he identified as the seed found in the appellant's dwelling. The sack containing the pods taken from the garage were marked

*Emphasis ours throughout.

Plaintiff's Exhibit 1-A for identification and the bottles of seed were marked Exhibits 2, 3, 4, 5 and 6.) (R. pp. 15, 16, 17.)

Deputy Sheriff Clarence Crawford testified that he had seen the bottles containing the seed at appellant's residence. (R. pp. 38, 39.)

The poppy pods which had been found in appellant's garage (Pltf's Ex. 1-a) were later identified by Chemist Inspector Allen E. Gilmore, of the California Bureau of Narcotics Enforcement (R. p. 45) to be "from the plant commonly termed the opium poppy" (R. p. 49) and the jars of seed (Pltf's Ex. 2, 3, 4 and 5) were identified by seed analyst Letha Howard (R. p. 51) as opium poppy seed (R. p. 53) excepting that some of the seed was mustard seed (R. p. 56).

No Proof of Fertility of Seeds.

No test was made to determine whether or not the seed were fertile or sterile although this is a part of the work of the seed testing laboratory.

> "A. Our work is testing seed. We haven't room enough to put them in the ground, so we test them in the laboratory for germination.
>
> Q. Germination to see whether they would sprout and grow.
>
> A. Yes.
>
> Q. Did you do that with any of these seeds?
>
> A. No.
>
> Q. So you don't know of your own knowledge, whether these seeds are sterile, of your knowledge?
>
> A. That wasn't the question. I identified them." (R. p. 57.)

As stated above there was no attempt made to identify the poppy plants *growing* at the ranch of the appellant as being opium poppy plants either by these witnesses or anyone else, either by reference to the photographs admitted in evidence or otherwise. Neither was any attempt made to connect up the poppy pods found in the garage with poppy plants found growing on appellant's premises.

Except for so-called "admissions" of appellant *the foregoing was the government's entire case.*

The So-called "Admissions".

Appellant Az Din is a foreigner whose ability to speak English is extremely limited.

Mr. House admitted:

"Q. You had never seen the defendant before?
A. No sir.
Q. Never talked to him before?
A. No, sir.
Q. Does he talk good English?
A. *Not very good, sir.*" (R. p. 25.)

After entering appellant's house during his absence and, so far as the record shows, apparently without a warrant, appellant was "brought back" to the premises by undersheriff Leverett (R. p. 17) and questioned by the three officers.

Asked about the unidentified flowers growing about the place he stated that he liked flowers. (R. p. 18.)

Asked about the opium poppy seeds he stated that he ground them up to make a tea which he drank. (R. p. 22.)

Asked about where he had obtained the seed he stated that he had obtained some of them at a drug store and that "some of the seeds he had obtained from other poppies." (R. p. 19.)

He stated that he knew it was against the law to grow the opium poppy. (R. p. 22.)

On cross-examination it was brought out:

"Q. Did you find any other seeds besides these at that place?

A. Yes, I did. . . .

Q. The other seeds were of an innoxious (innocuous?) type of seed and had no bearing upon this particular type of case, is that right?

A. That's right." (R. pp. 28, 29.)

This is substantially all of the evidence.

SUMMARY OF THE EVIDENCE.

Summarized the government's evidence exclusive of the so-called "confession" is:

1. That there was growing on the appellant's premises some poppies, kind or type never identified.

2. That in the garage on the appellant's place the government agents found some opium poppy pods.

3. That in the house the government agents found some opium poppy seeds in bottles, seeds not proven to be fertile but which if they were fertile could readily have been proven by the government to be such. Other bottles contained other seeds, some identified as mustard, some unidentified.

As stated above there was no attempt made to identify the poppy plants *growing* at the ranch of the appellant as being opium poppy plants either by these witnesses or anyone else, either by reference to the photographs admitted in evidence or otherwise. Neither was any attempt made to connect up the poppy pods found in the garage with poppy plants found growing on appellant's premises.

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Thus was the corpus delicti "established" to prove that on June 3, 1954 appellant was growing opium poppies!

Having thus established the corpus delicti, the government's case was then fortified by the appellant's "admissions" that:

4. He was growing the plants unidentified save that they were "poppies" because he liked flowers.

5. He had obtained part of the seeds found from a drug store and had raised part of them at some previous time—date and year undetermined.

6. That he used the seeds to make a tea which he drank to keep cool.

Upon this case the government predicated the charges: (1) That on June 3, 1954 appellant was wilfully, unlawfully and knowingly producing and attempting to produce the opium poppy;

(2) That within the period of limitations appellant was wilfully, unlawfully and knowingly obtaining opium poppy seed for the purpose of opium poppy production.

Appellant moved to dismiss and the motion was denied. Appellant put on no evidence.

The United States attorney then repeatedly argued: "Now this is a narcotics case" (R. pp. 82, 84), and notwithstanding the court's ruling that there was no evidence that the appellant was either a user of narcotics or intended to use the poppies for the ultimate production of narcotics (R. p. 90) he persisted in attempting to inflame the jury by repeated

references to his belief that the appellant was engaged in the narcotics trade (R. p. 98).

ARGUMENT.

INTRODUCTORY; APPELLANT WAS PRESUMED GUILTY.

As to each one of the counts the Court correctly instructed the jury that "the prosecution must prove to a moral certainty and beyond a reasonable doubt" all of the material elements of the crime charged. It charged that "the defendant is presumed to be innocent and that the presumption attends him to the end of the trial". (R. pp. 66, 69.) It charged that "the presumption of innocence . . . requires the Government to establish beyond a reasonable doubt every material fact averred in the indictment. (R. p. 69.)

But we respectfully submit that the solemn meaning of these fundamentally guaranteed rights and obligations on the government seems frequently to be dulled or lost in perfunctory repetition. Here the case never should have gone to the jury. The government made a case wholly founded upon a presumption of guilt.

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1. NO PROOF THAT POPPIES GROWING WERE OPIUM POPPIES.

By 21 USCA Sec. 188b it is unlawful for any unlicensed person "to produce or attempt to produce the opium poppy, or to permit the production of the opium poppy in or upon a place owned . . . or controlled by him".

By subdivision (c) of Sec. 188a of that act, the term "opium poppy" is defined to be the plant "Papaver somniferum".

All that the government proved here was that they had found in the garage of appellant and had put into a burlap sack some pods of a plant which their chemist identified as pods from an opium poppy.

They also proved that there were some flowers growing on the property which the government agents described as "poppies" but which they carefully refrained from describing as "opium poppies".

Despite the requirement that the case be proved to a moral certainty there was no effort to connect the growing poppies with the pods found in the garage.

The jury was required to, and did, presume that the appellant was guilty of growing opium poppies because pods of the plant were found in the garage—a complete nonsequitur, and no effort whatever was made to question the appellant as to how the pods came to be there, or otherwise connect up their presence with the growing of the plant.

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2. (a) NO PROOF THAT SEEDS FOUND WERE CAPABLE OF GERMINATION.

Possession of opium poppy seed by an unlicensed person is not unlawful.

The law expressly provides that opium poppy seed may be sold to unlicensed persons to be used as a spice seed or for the making of oil *but this is not an exemp-*

tion to an otherwise prohibited possession because nowhere does the law make mere possession of the seed criminal or even illegal.

It *is* unlawful to obtain (and therefore possess) opium poppy seed only if so obtained "for the purpose of opium poppy production".

21 USCA Sec. 188f.

Count 3 should have been dismissed because there was no proof whatever that the seeds in the appellant's possession were obtained for the production of opium poppies *or that they were even capable of being so used.*

The total failure by the government in the presentation of this case to make any effort to prove that these seed—ANY of these seed—were capable of germination and therefore capable of producing opium poppies seems to us to demonstrate a cynical disregard for the rights of a defendant in a criminal case.

Appellant had stated to the agents that the seeds were acquired for the purpose of making a tea with cooling propensities. So used there is nothing sinister about opium poppy seed, which when crushed and brewed into a tea evidently have a spicy flavor, this to be deduced from the legally recognized potentiality of the use of the seed as a spice.

Without the slightest evidence negativing this legitimate use of the seed the government agents—although their seed analyst freely admitted the facilities were available to her—failed to make the test. (R. p. 57.)

Why?

Was there a fear that the seeds would prove to be sterile and thus destroy even the flimsy case otherwise presented?

The seeds were not available to appellant to test. They were available to the prosecution and the means of making the test were readily at hand.

We submit that failure to prove that the seeds obtained were capable of producing opium poppies was failure to establish a necessary link in the proof required to establish the charge of the third count.

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2. (b) NO PROOF OF GUILTY INTENT.

According to the government agents appellant had admitted that at some previous time (three, five, fifteen years before?) he had obtained some seed from plants which he had grown upon his premises and other seed from a drug store.

There was no evidence whatever that the seed which were found were intended to be used to grow other opium poppy plants (which was the necessary element to be proved if the charge of the third count was to be sustained).

On the contrary appellant, as shown above, had affirmed that the intent was to produce a tea—an innocent intent *which the law expressly allows.*

> ". . . seed obtained from opium poppies . . . may be sold or transferred by such producers to unlicensed persons . . . for ultimate consump-

tion as a spice seed or for the purpose of making of oil."

21 USCA Sec. 188f.

"The Opium Poppy Control Act does not purport to regulate the production of an agricultural crop. The Act is directed to the growth of opium yielding poppy plants within the United States as the source, not of an edible food product, but rather of raw opium. Its effect upon the production of the poppy seed is incidental only to its operation on a plant which produces both narcotic drug and edible seed."

Stutz v. Bureau of Narcotics, etc. (D.C. N.D. Cal. N.D.) (1944) 56 F. Supp. 810 at page 812.

It is true that the statement that the agents attribute to appellant that at some date in the past he had grown seed would have been an admission of an unlawful act committed in the past, but this did not involve any charge for which he was then being tried.

The only evidence of intent in this whole record was that the seed—whatever its source—was possessed for the lawful purpose of producing a spice tea.

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3. APPELLANT WAS DEPRIVED OF FAIR TRIAL BY MISCONDUCT OF UNITED STATES ATTORNEY.

The question which any reasonable person would of necessity ask in the light of the foregoing review of the evidence is: How could the jury have returned a verdict of "Guilty" on such a flimsy case?

We submit they could not have done so except that appellant was tried, not upon the evidence, but upon the statements of the United States Attorney who argued NOT from the evidence produced at the trial but from his own imagination of what he suspected but couldn't prove but which he "testified" to in argument.

Repeatedly, the government agents sought to embellish their testimony with nonresponsive and clearly inadmissible conclusions. (e.g. see R. p. 19 where Inspector House seeks to testify: "indicating that he had grown poppies before".)

However reprehensible such conduct is on the part of trained government agents, it is scarcely to be noted in comparison with the conduct of the United States attorney in this case.

As demonstrated above there was not the slightest evidence that appellant was a user of narcotics, or that he had anything whatever to do with trafficking in narcotics. A native of Pakistan, his innocent addiction was shown to be a taste for the spicy tea, a use as lawful as the drinking of Lipton's product, made from opium poppy seed (and perhaps the other seed forms). To assume from the evidence in the record that he was identified in any way with the illicit narcotics trade and the spread of the narcotic habit was wholly unjustified; to seek to inflame the jury by so arguing was gross misconduct.

Yet here are the statements made by the United States Attorney:

"Now first of all it might be helpful for you to consider the fact that this is *a narcotics case.*" (R. p. 82.) ". . . Now this is *a narcotics case* and this statute was obviously passed by the Congress of the United States to prevent the spread of narcotics in this country." (R. p. 84.) ". . . Now this *is a narcotics case* . . ." (R. p. 84.) ". . . Now we don't know what he wanted all these seeds for. Was he getting ready to go into large scale production of these poppies?" (R. p. 87.) ". . . Furthermore, I do not believe that he just used the seeds to make the tea, either. Inasmuch as he was growing a narcotic plant, it would seem to me that he would make use of the narcotic in the plant rather than the seed." (R. p. 90.)

Objection was made to such inflammatory and prejudicial statements and innuendoes and a motion for mistrial was made. The trial Court denied the motion and told the jury:

"The motion for a mistrial will be denied. Ladies and gentlemen of the jury, there is no evidence, as you know, to the effect that the defendant in this particular case was a user of narcotics, that he intended to use these poppies for the ultimate production of narcotics, and the evidence, so far as the Court recalls, is merely that he was producing the plant, as testified. You are instructed that in your deliberations and in arriving at your verdict, you should dismiss from your mind any comment made by counsel on this particular point. You may proceed, counsel." (R. p. 90.)

If the Court's admonition was understood by the jury, it apparently was not understood (and certainly it was not heeded) by the prosecuting attorney who persisted in his endeavor to picture the defendant as a user and producer of narcotics by again stating to the jury:

> "I don't believe it is necessary to mention to you again the field in which the use of narcotics has spread in our society and point out to you that the fact that opium poppies produce opium and that opium is used to make, among other things, heroin." (R. p. 98.)

These statements constituted misconduct on the part of the United States Attorney prejudicial to appellant and prevented him from having a fair trial.

In *Berger v. United States* (1934) 295 U.S. 78, 55 S. Ct. 561, 87 L. Ed. 734, a judgment of conviction of defendant having conspired with certain others knowingly to utter and pass counterfeit bank notes was reversed for prejudicial misconduct on the part of the prosecuting attorney. The Supreme Court stated at page 1320 of 79 L. ed.:

> "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. A reading of the entire argument is necessary to an appreciation of these objectionable features."

And on page 1321:

> "The United States Attorney is the representative not of an ordinary party to a controversy,

but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. . . . Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, and persistent, with misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Compare New York C. R. Co. v. Johnson, 279 U.S. 310, 316-318, 73 L. ed. 706, 709, 710, 49 S. Ct. 300.

The views we have expressed find support in many decisions, among which the following are good examples: People v. Malkin, 250 N.Y. 185, 164 N.E. 900, supra; People v. Esposito, 224 N.Y.

> 370, 375-377, 121 N.E. 344; Johnson v. United States (C.C.A. 7th), 215 F. 679, supra; Cook v. Com., 86 Ky. 663, 665-667; Gale v. People, 26 Mich. 157; People v. Wells, 100 Cal. 459, 34 P. 1078. The case last cited is especially apposite."

The rule, and language of the opinion, in the *Berger* case has found more recent reiteration in *Viereck v. United States,* 318 U.S. 236, 248 (63 S. Ct. 561, 87 L. ed. 734). Both of these cases were quoted from in the recent decision of the California District Court of Appeals in *People v. Brophy* (1954), 122 C.A. 2d 638, 265 P. 2d 593 where the prosecuting attorney in arguing a case involving an assault with a deadly weapon showed a bullet to the jury in his argument which had not been introduced in evidence.

The prosecuting attorney was also guilty of prejudicial misconduct in making statements to the jury regarding the personal knowledge of the prosecuting attorney of the issues. In his argument to the jury the prosecuting attorney testified as an unsworn witness:

> "In the second place, you just can't buy poppy seeds in any drug store in this country I know of. seeds in any drug store in this country I know of." (R. p. 88.) ". . . I said I don't believe the defendant because he couldn't buy these seeds in any store I know of." (R. p. 89.)

Counsel for appellant objected to such prejudicial misconduct and the Court told the jury:

> ". . . There is no evidence, as evidence, presented before you that you can't buy poppy seed in a drug store. Counsel has said that he doesn't

know of any. I call your attention specifically to point that there is no proof or evidence on that point. Its materiality is something else. I think, counsel, that the comment concerning the inability to purchase these seeds should be stricken."

But the United States attorney was not to be deterred from obtaining defendant's conviction regardless of the method by which he would obtain it. Having been interrupted in his argument by the Court's admonishment he resumed his argument and again told the jury:

"Let me say, if I may, ladies and gentlemen, that I do not believe the defendant when he said he got the seed from the drug store and the basis of my belief is from *my own experience.*" (R. p. 90.)

Again the United States attorney had ignored the standard of conduct required of him and pronounced by the United States Supreme Court in *Berger v. United States,* supra, that:

"He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

A conviction obtained by the use of such methods cannot stand.—*Taliaferro v. United States* (1931) (C.C.A. 9th) 47 F.(2d) 699.

In *Taliaferro v. United States* (1931) (C.C.A. 9th) 47 F. (2d) 699, defendant was found guilty by a jury of unlawful possession and transportation of intoxicating liquor. At the trial two prohibition agents testified defendant delivered a bottle of liquor to them but upon being arrested by them defendant grabbed the bottle and broke it in defendant's automobile. The two agents testified a small quantity of the liquor was recovered from the broken bottle and some of it was mopped up from the floor of the automobile. Testimony on behalf of defendant tended to show that the condition of the floor of the automobile was such that the liquor would have run through the cracks in the floor boards and immediately disappeared. On appeal defendant assigned as error the argument to the jury of the prosecuting attorney who stated during the course of his argument to the jury:

> "As a matter of fact, while the prohibition department had it, we removed the floor-boards to take out the battery and the floor was in a different condition then than upon the night of the arrest. *I know that of my own knowledge.*"

The Ninth Circuit Court of Appeals held that such statement was prejudicial, and the failure of the Court on motion to instruct the jury to disregard it called for a reversal of the case.

The Court after setting forth the limits to which counsel may go in their argument stated at page 702:

> "Cases are to be decided by juries upon the evidence, and when the evidence is offered by wit-

nesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not." (*Lowdon v. United States,* 149 F. 673, 676, (C.C.A. 5th.)

And the Court quotes from *Commonwealth v. Shoemaker,* 240 Pa. 255, 87 A. 684, 685, 38 Cyc. 1496:

> "It is error for counsel * * * to state * * * his own knowledge of facts unless he has testified thereto as a witness, * * * or to insinuate that he has knowledge of facts which are calculated to prejudice the opposite party."

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4. COUNT THREE WAS BARRED BY THE STATUTE OF LIMITATIONS.

Count 3 of the indictment charges:

> "That the said defendant, . . . heretofore, prior to the 3rd day of June, 1954, at a time to the Grand Jurors unknown, near Arbuckle (etc.) . . . did wilfully, unlawfully and knowingly obtain poppy seed for the purpose of opium poppy production."

The indictment in this case was filed June 14, 1954. At that time Section 3282 of Title 18 of USCA provided as follows:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted *within three years* next after such offense shall have been committed."

Section 3282 of said title as amended on September 1, 1954, provides:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted *within five years* next after such offense shall have been committed."

Section 10(b) of act of September 1, 1954, provided:

> "the amendment made (to this section) by subsection A (of such act) shall be effective with respect to offenses (1) committed on or after the date of an enactment of this act (September 1, 1954) or (2) committed prior to such date if on such date prosecution therefor is not barred by provisions of law in effect prior to such date."

There was no evidence whatever in this case that the appellant had obtained the seed in question for growing opium poppies within three years of September 1, 1954, or within five years of June 3, 1954 for that matter, nor was there any evidence that the

appellant had obtained any seeds for any other purpose within said periods.

The burden was upon the prosecution to establish that the crime was committed within the period of the statute of limitations.

Butler v. U. S., 33 F. (2d) 382;
U. S. v. Schneiderman (1952) 106 F. Supp. 892.

Defense of the statute of limitations was raised in the motion for dismissal. (R. p. 62.)

The motion was denied.

The Court correctly instructed the jury that it was the burden of the government to prove that the alleged crime was committed within the period of limitations. (The Court incorrectly instructed as to what the period was.) However, since there was no proof from which the jury could find that the seeds had been obtained within three, five or fifty years the Court, and not the jury, should have determined the issue and the motion for judgment of dismissal should have been granted.

INSTRUCTION NO. 14 IN ERROR.

The Court instructed the jury (by Instruction No. 14):

> ". . . it being sufficient for the purposes of this case that it is shown that the offenses were committed within five years of the filing of the charges in this Court."

Under the authorities above this instruction was clearly in error.

Dated, Sacramento, California,
October 14, 1955.

Respectfully submitted,
DUARD F. GEIS,
PIERCE & BROWN,
FRED PIERCE,
BENJAMIN H. BROWN,
Attorneys for Appellant.